IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-498

JUPITER INLET CORPORATION, *Petitioner*

v.

THE VILLAGE OF TEQUESTA, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

FRED P. BOSSELMAN
Ross, Hardies, O'Keefe,
Babcock & Parsons
One IBM Plaza — Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Petitioner

MARJORIE DIANE GADARIAN
Jones, Paine and Foster, P.A.
601 Flagler Drive Court
Post Officer Drawer E
West Palm Beach, Florida 33402
(305) 659-3000
Counsel for Petitioner

Of Counsel:
JOEL F. BONDER
Ross, Hardies, O'Keefe,
Babcock & Parsons
Chicago, Illinois 60611

MARGARET L. COOPER
Jones, Paine and Foster, P.A.
West Palm Beach, Florida 33402

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Petitioner Jupiter Inlet Corporation, Respectfully Prays That A Writ Of Certiorari Issue To Review The Judgment And Opinion Of The Supreme Court Of The State Of Florida Entered In This Proceeding On June 26, 1979.[1]

OPINIONS BELOW

The opinion of the Supreme Court of the State of Florida, dated May 3, 1979, is reported at 371 So. 2d 633, (1979) (App. 10). The denial of Petitioner's timely petition for rehearing, dated June 26, 1979, is also reported at 371 So. 663. The opinion is not reported and appears in the Appendix at page 28.

The opinion of the District Court of Appeals of the State of Florida, Fourth District, dated August 9, 1977, is reported at 349 So. 2d 216 (1977) (App. 5).

The Circuit Court, Palm Beach County granted summary judgment in favor of Respondent. That order is not reported. It is included in the Appendix at page 2.

[1] In addition to the Village of Tequesta, a Florida municipal corporation, the respondents are Thomas J. Little, William E. Leone, William J. Taylor, Dorothy M. Campbell, and Almeda A. Jones, former town councilmen of the Village of Tequesta.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on June 26, 1979, following the denial on June 26, 1979, of Petitioner's timely petition for rehearing. (App. 28) This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether Petitioner has a protectable property interest within the meaning of the Florida and United States Constitutions in its right to use the shallow water aquifer lying beneath its land.

2. Whether Respondent's excessive withdrawal of fresh water from the shallow aquifer underlying both Respondent's and Petitioner's land, causing salt water to intrude upon and flood the aquifer underlying Petitioner's land, constitutes a taking of Petitioner's property within the meaning of the Florida and United States Constitutions.

3. Whether this Court should disregard the Florida Supreme Court's determination that Petitioner had no protectable interest in the groundwater aquifer because such determination is so radical a change in state law, unpredictable in terms of the relevant precedents, that it does not conform to the reasonable expectations of property owners and violates procedural due process required under the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Amendment V

No person shall . .. be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section I

No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Constitution of the State of Florida:

Article 1, Section 9

No person shall be deprived of life, liberty or property without due process of law . . .

Article 10, Section 6(a)

No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and available to the owner.

Florida Statutes:

Chapter 373

STATEMENT OF THE CASE

The facts in this case were established by deposition testimony and were treated by the Florida courts as undisputed. A summary judgment was granted in favor of Respondent by the trial court, (App. 2) and therefore the issues presented by this petition arise only from rulings of law made by the Florida Supreme Court. Under Florida law on a motion for summary judgment, the moving party has the burden of establishing that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law. The facts are construed in a light most favorable to the non-moving party. *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966); *Scanlon v. Litt*, 191 So. 2d 553 (Fla. 1966), *Howe v. South Broward Hospital District*, 345 So. 2d 1079 (Fla. 4th DCA 1977).

Jupiter Inlet Corporation (Jupiter), a Florida corporation, owned property near the Village of Tequesta (Tequesta), on which Jupiter planned to build a 120-unit condominum project, "Broadview." (App. 10) Underlying the property of

both Jupiter and Tequesta was a shallow water aquifer, located just 60 feet below the surface, from which it was relatively inexpensive to withdraw water. (App. 10)

Jupiter's property was located approximately 1200 feet from the Village of Tequesta's well field number four. (App. 10) The field contained seven water wells, each 75-90 feet deep, which pumped in excess of one million gallons of water a day from the shallow water aquifer to supply Tequesta residents with water. (App. 10) The water which Tequesta withdrew came from the same shallow aquifer as was beneath the Petitioner's land. (App. 11)

As a result of the large amount of water withdrawn by Tequesta from the shallow water aquifer, salt water from the Intracoastal Waterway intruded into the shallow water aquifer underlying Jupiter's land and forced out the fresh water. A hydrologist with the United States Geological Survey testified by deposition that the salt water intrusion was caused by a reduction in the water level of the fresh water to a point low enough that the fresh water level could not withstand the pressure of the salt water. (App. 35)

Because of Tequesta's actions the only means by which Jupiter could supply water to its property was to drill a well to the Floridan aquifer, located 1200 feet below the surface, at a substantially greater cost. (App. 11)

Jupiter instituted an action for inverse condemnation of the shallow water acquifer beneath its land and sought compensation for the taking of its property — the right to the use of water in the shallow water aquifer — and an injunction prohibiting Tequesta from further pumping of water from the shallow water aquifer. (App. 29) The action was brought under Article 10, §6(a) of the Florida Constitution, which provides that private property shall not be taken for a public purpose without just compensation.[2]

[2]At the time this action was instituted, the Florida standard for compensation in such circumstances was similar to the federal standard under the Fifth Amendment to the United States Constitution. Under both, "right of user" in water was a protected property interest.

The trial court, correctly interpreting Florida law, concluded that the right to use underground water constitutes a protectable property interest within the meaning of Article 10, §6(a) of the Florida Constitution. However, the court misapplied the existing law in finding that the taking caused only consequential damages, thus precluding condemnation proceedings. Respondent's Motion for summary judgment was granted and a final judgment was entered in favor of Tequesta. (App. 2, 4)

Jupiter filed a timely appeal to the District Court of Appeal of Florida, Fourth District. (App. 5) The court reversed, holding that the trial court should not have granted summary judgment and that the Petitioner had alleged sufficient facts to state a cause of action for inverse condemnation. In so ruling, the court correctly set forth the Florida standards as to whether the Petitioner's right to use the aquifer at issue constituted a protectable property interest and whether there had been a taking of that property interest.
The court held:

> It seems apparent . . . that when something is removed from its owner's property by a governmental agency and put to a public use, it has been taken. The owner has been deprived by government action of the use and enjoyment of what was his, and so through a suit in inverse condemnation he can compel the government to pay for what it has taken . . .
>
> The shallow aquifer beneath the surface of land is a form of private property, the beneficial use of which the owner of the land cannot be divested by the government for a public purpose without due process of law and the payment of full compensation. See *Valls v. Arnold Industries, Inc.*, 328 So. 2d 471 (Fla. 2d DCA 1976).

Thus, the Court of Appeal properly concluded that the right to use the aquifer underlying Jupiter's land was a property interest and that that interest was taken by the Respondent.

On petition for certiorari, the Florida Supreme Court

quashed the decision of the District Court of Appeal. (App. 10) In so doing, the court expressly overruled previous Florida case law and held that the right of user in underground water is not a protected property interest within the meaning of Article 10, §6(a) of the Florida Constitution, and thus the diversion of fresh water from the shallow aquifer could not constitute a taking requiring condemnation proceedings.

A timely petition for rehearing was denied without argument. (App. 28)

HOW THE FEDERAL QUESTIONS WERE RAISED

The federal questions presented herein were raised at the earliest opportunity on May 18, 1979, by a timely petition for rehearing to the Florida Supreme Court (App. 26). The petition was denied without argument on June 26, 1979, (App. 28).

Jupiter's rights under the Fifth and Fourteenth Amendments to the United States Constitution were not raised prior to its petition for rehearing because Petitioner reasonably and justifiably relied on the definition of "property" adopted by the Florida state courts prior to the Florida Supreme Court's opinion in this case. All previous Florida decisions utilized a standard which was well within the ambit of the federal standard as to what constitutes a "property interest" within the meaning of the United States Constitution. That definition led Petitioner to believe that it had a protectable property interest in the use of the shallow water aquifer beneath his land and that he would be afforded adequate relief under state law.

The trial court and the 4th District Court of Appeal both followed the established principles of Florida law, although the trial court incorrectly applied the law. The Florida Supreme Court radically and unexpectedly changed the principles of Florida property and water law. The issue of a taking

of Jupiter's property without just compensation in violation of the Fifth Amendment to the United States Constitution did not arise until the Florida law was changed because Jupiter's rights had been fully protected under Florida law. Secondly, the issue of deprivation of procedural due process required under the 14th Amendment because of a sudden and unexpected departure from established state law did not arise at all until the Florida Supreme Court decision was rendered.

When relief under the Florida State Constitution was improperly and unexpectedly taken away, Jupiter timely raised the federal constitutional issues in his petition for rehearing. Jupiter seeks relief from this Court.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS JURISDICTION TO ISSUE A WRIT OF CERTIORARI IN THIS CASE.

The judgment of the court below is a final judgment. The Federal questions presented are substantial and were raised at the earliest opportunity by Petitioner in his petition for rehearing to the Florida Supreme Court, conferring jurisdiction on this court under 28 U.S.C. § 1257(3).

No federal question was raised until the Florida court announced a complete and unexpected change in the property and water law of the State of Florida by concluding that the right to use unappropriated groundwater was not a property interest and therefore could not be the subject of a taking. Petitioner had no forewarning that the court intended to overturn years of established law, history and precedent in an opinion not foreshadowed by previous cases and that therefore it would not be afforded adequate relief under state law. The Florida Supreme Court's departure from established law, narrowing the interpretation of "property interest" was the first indication to Petitioner that rights guaranteed under the federal constitution were likewise being infringed upon.

He then timely raised the federal constitutional issues in his petition for rehearing.

Where Federal questions first arise in an unanticipated ruling of the state's highest court, presentation of those questions in a timely petition for rehearing is adequate to invest this court with jurisdiction of the case on Writ of Certiorari. *Brinkerhoff — Farris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) and *Missouri ex rel Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930).

II. UNDER BOTH THE FLORIDA AND FEDERAL CONSTITUTIONS A PERSON IS ENTITLED TO A HEARING AND JUST COMPENSATION WHEN PRIVATE PROPERTY IS TAKEN FOR A PUBLIC PURPOSE.

Under both the Florida and Federal Constitutions, private persons are protected from having property interests taken by governmental action for a public purpose without just compensation.

The Florida Constitution provides:

Article 10, Section 6(a):

> No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and available to the owner.

Article 1, Section 9:

> No person shall be deprived of life, liberty or property without due process of law . . .

The corresponding provisions are found in the Fifth and Fourteenth Amendments to the United States Constitution:

> Amendment V
>
> No person shall . . . be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

> Amendment XIV, Section I
>
> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

It is well established both in the Florida and federal courts that if property is taken by governmental action for a public purpose, and no condemnation action is brought by the governmental authority, the person deprived may institute an inverse condemnation action to enforce his right to compensation. It is also well established that Fifth Amendment rights guaranteed under the United States Constitution are equally applicable to actions by a state or a municipal government as well as to actions by the federal government. *Martin v. Creasy*, 360 U.S. 219 (1959) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

In this case, Petitioner is afforded protection against a taking of private property under both the Florida and Federal Constitutions. Prior to the change in the definition of property interests by the Florida Supreme Court in the instant case, it would have been redundant to have brought an action to enforce Petitioner's federally protected rights. The Petitioner fully expected those rights to have been protected by an enforcement of its rights guaranteed under the Florida Constitution.

III. PRIOR TO THE FLORIDA SUPREME COURT DECISION IN THIS CASE, THE LAW WAS WELL ESTABLISHED THAT THE RIGHT TO USE THE UNDERGROUND AQUIFER LOCATED UNDER ONE'S PROPERTY WAS A PROTECTED PROPERTY INTEREST WITHIN THE MEANING OF THE FLORIDA CONSTITUTION AND COULD NOT BE TAKEN FOR A PUBLIC PURPOSE WITHOUT JUST COMPENSATION.

A. The Right To Use Unappropriated Groundwater Constitutes A Protectable Property Interest.

Under Florida law prior to the decision in this case, the

right to reasonably use unappropriated groundwater had long been treated as a property interest, and therefore, subject to the taking clause of Article 10, §6(a) of the Florida Constitution.

(1) The Florida Supreme Court radically changed this law, reverting to a prior appropriation standard.

Property, in the constitutional sense is not limited to the physical object of ownership, but also includes the right to acquire, use, enjoy, possess, sell and dispose of it for lawful purposes. *Kass v. Lewin,* 104 So. 2d 572 (Fla. 1958); *Tatum Brothers Real Estate & Investment Co. v. Watson,* 109 So.623 (Fla. 1926). Fee simple ownership vests in the property owner more than a physical interest in the land. It gives certain legal rights and privileges constituting appurtenances to the land and its enjoyment. *State Department of Transportation v. Stubbs,* 285 So.2d 1 (Fla. 1973). The title holder owns not only the surface of the land but also, the mineral and oil rights below, the rights to the airspace above, the right to access to his property and the right to the reasonable use of water beneath his land. *Lykes Brothers Inc. v. McConnel,* 115 S.2d 606 (Fla. 2d DCA 1959); *Dickinson v. Davis,* 224 So.2d 262 (Fla. 1969); *Copello v. Hart,* 293 So.2d 734 (Fla. lst DCA 1974); *Valls v. Arnold Industries Inc.,* 328 So.2d 471 (Fla. 2d DCA 1976); *Koch v. Wick,* 87 So.2d 47 (Fla. 1956).

There have been two theories espoused regarding water rights — (1) the reasonable use doctrine and (2) the prior appropriation doctrine. Under both theories, water rights are usufructuary, that is, there is a right to the *use* of the water, not a physical interest in the water itself.

Under the English common law rule of prior appropriation, percolating waters were considerd part of the land under which they were found and belonged exclusively to the owner of the land, who had the absolute right to use the water beneath his land in such manner as to drain the water from beneath adjoining lands. *Acton v. Blundell,* 12 M&W 324 (1843). The American courts have not followed the old common law rule, but have generally adopted a reasonable use

rule which permits the owner to use the water. The use is bounded by reasonableness and beneficial use of land. In *Koch v. Wick, supra,* the Florida Supreme Court rejected the common law rule of absolute ownership and adopted a reasonable use rule.

Under the reasonable use doctrine, the right of one owner to withdraw water is confined to a reasonable use of his property as it affects subsurface water passing to or from the land of another. *Labruzzo v. Atlantic Dredging and Construction Co.,* 54 So.2d 673, (Fla. 1951); *Koch v. Wick, supra; Cason v. Florida Power Co.,* 76 So.535 (Fla. 1917); Maloney, Plager and Baldwin, *Water Law and Administration — The Florida Experience,* §54.2(c) (1968).

The trial court in the instant case conceded there was a right to use in the shallow aquifer, but misapplied the applicable law concerring whether the intrusion was a taking. (App. 2,5)

Likewise, the District Court of Appeal specifically stated that this right of user was a protected property right and reversed as to the trial court's misapplication of the law. Both the trial court and the District Court of Appeal relied upon long established Florida case law, all holding that the right of user is a protected property interest.

In *Thiesen v. Gulf, Florida & Alabama Railway Co.,* 78 So.49 (Fla. 1918), the Florida Supreme Court specifically held that riparian rights constitute "property", a lawful taking of which requires the payment of just compensation.

In *Cason v. Florida Power Co.,* 76 So.2d 535 (Fla. 1917), plaintiff alleged that defendant's construction of a dam had obstructed the flow of surface and percolating waters on plaintiff's land to his injury. The Florida Supreme Court held that

> The *property rights* relative to the passage of waters that naturally percolate through the land of another owner are correlative; and each landowner is restricted to a reasonable use of his property as it affects subsurface waters passing to or from the land of another. Id. at

536 (emphasis supplied).

In *Pensacola Gas Co. v. Pebley,* 5 So.593 (Fla. 1889), plaintiff alleged that the defendant had polluted the subterranean percolating waters feeding plaintiff's well. The Florida Supreme Court recognized the plaintiff's property rights in the use of water beneath his land, and stated

> The appellant gas company had the right to use the water in and about the gas-works as they pleased, but they had no right to allow the filthy water to escape from their premises, and to enter the land of their neighbors." Id. at 595.

In *Koch v. Wick,* 87 So.2d 47 (Fla. 1956), Pinellas County sank wells on the right of way adjacent to plaintiff's property and withdrew three million gallons of percolating water daily for distribution to individuals and municipalities in the county. The Plaintiff sought an injunction against the county, arguing that he would suffer such a loss of water that his land would become arid. The court held that injunctive relief was proper, recognizing therefore that the plaintiff had a property interest in the rights of use.

Quite notably, the plaintiff in *Koch* had not begun to use the water beneath his land. It is apparent from the *Koch* decision that even though a landowner has not yet exercised his rights in unappropriated groundwater, he still has a property interest that can be protected. See also, *Labruzzo v. Atlantic Dredging and Construction Co.,* 54 So.2d 673 (Fla. 1951).

Of particular interest is *Valls v. Arnold Industries,* 328 So. 2d 471 (Fla. 2d DCA 1976), because it was this case which the district court specifically cited and which the Florida Supreme Court specifically overruled. In *Valls,* the District Court of Appeal stated:

> *Water,* oil, minerals and other substances of value which lie beneath the surface *are valuable property rights which cannot be divested without due process of law and the payment of compensation."* (at p. 473) (emphasis supplied)

Ironically, the Florida Supreme Court recognized that right to user is a property interest, but ruled that it did not become a property interest until the use actually began. In its opinion, the court stated:

> It is incumbent upon Jupiter to show, not only a taking, but also that a private property right has been destroyed by governmental action. Jupiter did not have a constitutionally protected right in the water beneath its property. In the cases cited by Jupiter, the courts supported compensation for the taking of a use which was existent and of which a party was deprived. Jupiter seeks to be compensated for a use which it had never perfected to the point that it was in existence. *Jupiter had a right to use the water, but the use itself is not existent until this right is exercised.* (App. 20) (emphasis supplied).

In other words, the Florida Supreme Court, made a sudden departure from established Florida law, ruling that the recognized right of user did not become a protected property right until it is actually being used. This is a total departure from the "reasonable use" doctrine and a reversion to a "prior appropriation" doctrine.

B. APPROPRIATION OF THE FRESH WATER IN THE AQUIFER UNDER PETITIONER'S PROPERTY CAUSING SALT WATER INTRUSION CONSTITUTES A TAKING.

In the instant case, the right to use the shallow water aquifer has been taken by the actions of Tequesta because the aquifer has been flooded by salt water and rendered unusable as a result of Tequesta's excessive withdrawal from the shallow aquifer.

Tequesta removed in excess of one million gallons of water per day from the shallow water aquifer to supply water to the town residents. (App. 10) A hydrologists testified that the excessive water withdrawals caused salt water from the Intracoastal Waterway to intrude into the shallow water aquifer. Salt water intrusion occurs when the water level in

interior lands is reduced so that the fresh water level cannot withstand the pressure of the salt water contained in the Intracoastal Waterway. Tequesta removed in excess of one million gallons of water per day from the shallow water aquifer to supply water to the town residents. (App. 10) A hydrologist testified that the excessive water withdrawals caused salt water from the Intracoastal Waterway to intrude into the shallow water aquifer. Salt water intrusion occurs when the water level in interior lands is reduced so that the fresh water level cannot withstand the pressure of the salt water contained in the Intracoastal Waterway. (App. 35) When this occurs, the salt water pushes the fresh water out and floods the aquifer with salt water. See also deposition of Leonard Lindahl, the consulting engineer, for further support. (App. 34)

It is important to note that the shallow aquifer and Floridan aquifer are totally distinct. The entire shallow aquifer is now useless. Therefore, Petitioner's right to use in the shallow aquifer has been totally taken. It is irrelevant that Petitioner still has a right to use the deep aquifer because that is a separate and distinct right.

The Florida Supreme Court looked at the impact of the actions of Tequesta on the whole of Plaintiff's property because they found that the water right was not a protected property interest. If they had found that the right of user was a protected property interest, the court would have looked to the impact on that specific right. The impact on the specific right was to render it useless. Thus, there was taking.

IV. THE RIGHT TO USE UNAPPROPRIATED GROUNDWATER LOCATED UNDER ONE'S LAND IS A PROTECTABLE PROPERTY INTEREST UNDER THE UNITED STATES CONSTITUTION.

A. RESPONDENT'S FLOODING OF THE ACQUIFER UNDERLYING PETITIONER'S LAND WITH SALT WATER CONSTITUTED A TAKING OF PETITIONER'S PROPERTY.

Having established by the record below that Respondent's actions have caused a salt water intrusion under Petitioner's land, Petitioner believes that ample precedent exists for this Court to conclude that the flooding of the fresh water aquifer with salt water constitutes a physical taking of Petitioner's property.

In *Pumpelly v. Green Bay,* 80 U.S. 166 (1871), a Wisconsin state law authorized the construction of a dam to control floods, however, the dam caused the flooding of the plaintiff's land. The Court held that the flooding was a taking, but limited its holding to where real property "is actually invaded by superinduced additions of water, earth, sand or other material or by having any artificial structure placed on it so as to effectually destroy or impair its usefulness. Id. at p. 181)

The Court followed *Pumpelly* in *U.S. v. Lynah,* 188 U.S. 445 (1903). In *Lynah,* the government's work on the Savannah River caused waters to percolate through the embankments surrounding plaintiff's land and turned his rice plantation into a bog. The Court held that a taking of plaintiff's property had occurred:

> It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into a irreclaimable bog; and this as the necessary result of the work which the government has undertaken. Id. at p. 469

Similar to *Lynah* is the instant case. Here, the Respondent has withdrawn excessive amounts of water from the shallow water aquifer under both the Petitioner's and Respondent's land and has caused the flooding of the fresh water aquifer with salt water. As a result of this salt water intrusion the Petitioner has been permanently deprived of the beneficial use of the aquifer. The fresh water that formerly occupied the aquifer is gone, pushed out by the useless salt water. Petitioner's property has been physically taken, and the value of that property destroyed.

The fact that Petitioner's interest in the groundwater aquifer is denominated "water rights" does not diminish its status as property for purposes of the taking clause. In *Dugan v. Rank*, 372 U.S. 609 (1963), claimants of water rights along a river in California which was part of a federal government reclamation project sued to enjoin the United States Bureau of Reclamation from storing the diverting the river's water upstream. In its opinion, this Court stated:

> . . . A seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land . . . Therefore, when the Government acted here with the purpose and effect of subordinating the respondents' water rights . . . with the result of depriving the owner of its profitable use . . . the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. Id. at p. 625)

Under the holdings in *Pumpelly, Lynah,* and *Dugan,* Petitioner's property has been taken and he is entitled to compensation. The Court below was clearly in error to hold otherwise.

B. THE FLORIDA SUPREME COURT CANNOT EVADE FEDERAL CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS BY REDEFINING "PROPERTY."

In its opinion below, the Supreme Court of Florida concluded that the Petitioner's water rights in the shallow water aquifer under its land were not a property interest under Florida law and therefore not entitled to compensate as a "taking" under the Florida constitution. It is Petitioner's position that groundwater is property for purposes of the Fourteenth Amendment of the United States Constitution, and that there are ample grounds for this Court to disregard

the Florida Supreme Court's holding and to make an independent determination that Petitioner possessed a property interest under either federal common law, as recognized previously by this Court, or under established Florida State law prior to the Florida Supreme Court's decision in the instant case.

In construing the meaning of the term "property" as used in the due process clause of the Fourteenth Amendment, this Court ordinarily follows the definition of "property" used by the relevant state, but this Court has indicated that state law will not control should some other principle of federal law require a different result. *Oregon ex rel State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 378 (1977). The Petitioner contends this is such a case.

In *Hughes v. Washington,* 389 U.S. 290 (1967), the Washington State Supreme Court had ruled that title to accreted ocean front land vested in the state rather than the abutting landowners. This deprived the abutting landowner of a substantial amount of beachfront property to which she held under pre-existing state law. This Court reversed the state court's ruling. In a concurring opinion, Mr. Justice Stewart asserted that while the state court's interpretaton of its own state's law — in this case its constitution —

> . . . would ordinarily bind this Court . . . here the state and federal questions are inextricably intertwined . . .
>
> We cannot resolve the federal question whether there has been . . . a taking without first making a determination of our own as to who owned the seashore . . . To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must, of course, accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property with-

> out due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus, inevitably presents a federal question for the determination of this Court. . . . [T]he Due Process clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature . . . Id. at p. 296-97

Mr. Justice Stewart's opinion was later cited in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 331 (1973) and in Mr. Justice Stewart's dissent in that case (at page 337, footnote 2). Although *Bonelli* was subsequently overruled, and *Hughes* limited by *Oregon v. Corvallis Sand and Gravel Co., supra*, the effect of *Oregon* was to give added support to Mr. Justice Stewart's opinion in *Hughes*.[3]

In *Oregon*, this Court again focused its attention on the principle of stare decisis and how the substantive rules governing the law of real property are peculiarly subject to that principle. The court was particularly concerned with the effect its ruling three years earlier in *Bonelli* had had on the

[3]See also, *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Hawaii, 1978) in which property owners appealed a judgment entered in favor of the County in a state eminent domain proceeding, alleging that they were deprived of due process of law as a result of the Hawaii Supreme Court's ruling that the vegetation line was the monument locating the seaward boundary of their land following erosion, rather than the mean high water line or seaweed line. The United States District Court held that the judgment was so radical a departure from prior state law as to constitute a taking of property owner's property without just compensation and an abridgement of property owner's constitutional right to due process of law. And see, *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Hawaii, 1977), in which the United States District Court held that a determination by the Hawaii Supreme Court that the state owned all surplus waters in the streams of Hawaii worked an unconstitutional taking of property without compensation and without due process of law because there was no precedent for the determination, all persons in Hawaii having previously been led to believe that they had clearly defined and well established water rights in such waters.

expectations of property owners and concluded that

> [s]ince one system of resolution of property disputes has been adhered to from 1845 until 1973, and the other only for the past three years, a return to the former would more closely conform to the expectations of property owners than would adherence to the latter. (429 U.S. 363, 382)

See also, *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924).

It is Petitioner's contention that the decision of the court below constituted such a sudden, radical change in Florida property and water law, so unpredictable in terms of the relevant precedents, that no deference is due it and that this Court should determine that a principle of federal law — the protection of Petitioner's property interests and due process guarantees under the Fifth and Fourteenth Amendments — requires a different result in this case.

Petitioner believes that from its previous discussion concerning Florida law prior to the decision in this case this Court can conclude that state property and water law was clear and consistent and that it was therefore reasonable for all owners of water rights in unappropriated groundwater in Florida to believe that they held a property interest in those waters and that these property rights were subject to the protections afforded by both the Florida and United States Constitutions.

These cases are consistent with federal common law which has long recognized water rights in groundwater as a protectable property interest. In *Cappaert v. United States*, 426 U.S. 128 (1976), this Court enjoined the petitioners from pumping groundwater from wells on their land which had the same underground water source as Devil's Hole, a pool which served as the habitat of a unique desert fish and which had been designated a national monument under the American Antiquities Preservation Act. The previous pumping by the petitioners from their wells 2½ miles from Devil's Hole had

lowered the water level of the pool so as to endanger the fish. This Court held that under the reserved water rights doctrine, the United States acquired by reservation water rights in unappropriated, appurtenant groundwater sufficient to preserve the pool's scientific value. It is clear that the Court treated groundwater as a separate property interest.

Petitioner believes that this Court should conclude based on either prior Florida law or federal common law that Petitioner's unappropriated groundwater is property for purposes of the Fourteenth Amendment.

V. THE FACT THAT RESPONDENT HAS NOT TAKEN ALL OF PETITIONER'S PROPERTY DOES NOT EXCUSE THE PHYSICAL TAKING OF PART OF PETITIONER'S PROPERTY.

The Florida Supreme Court said that because Petitioner still had a right to use water from a deep water aquifer that it had suffered only consequential damages. 371 So.2d at 668. (App. 16)

However, the Constitution protects against partial takings as well as complete takings. The fact that Petitioner has not lost use of all of its land is irrelevant. A portion of its land — the groundwater aquifer — has been physically "taken" by being flooded with salt water.

A similar situation was involved in *United States v. Cress*, 243 U.S. 326 (1917). A dam subjected the Cress land to recurring floods, reducing its value by one half. The government contended that this was only a partial injury for which it was not liable. This court disagreed:

> [I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking. Id. at p. 328

See also, *Jacobs v. United States*, 290 U.S. 13, 16 (1933).

In cases of partial taking "[d]amages . . . are to be measured by the difference in market value of the respondent's land before and after the interference or partial taking." *Dugan v. Rank*, 372 U.S. 609, 624-25 (1963). See also *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 632 (1961).

The record shows that a significant portion of Petitioner's property has been permanently flooded with salt water, rendering it useless and of no value whatsoever. Under the rule of the foregoing cases, Petitioner has suffered substantial damage and is entitled to compensation for a partial taking of his property.

VI. THE DECISION OF THE FLORIDA SUPREME COURT IS NOT BASED ON ANY ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

A. THE FLORIDA SUPREME COURT DECIDED THE CASE ON THE MERITS.

The Respondent may argue that the Florida Supreme Court ruled that the Petitioner failed to exhaust administrative remedies by failing to appeal its denial of a permit application. The Florida Sumpreme Court did not so rule and decided the case on its merits. Therefore, exhaustion of administrative remedies is not an independent state ground upon which the Supreme Court based its decision.

Furthermore, exhaustion of administrative remedies is an affirmative defense, which was never pled and never raised in this case at a proper level. (App. 32) The Florida Supreme Court decision could thus not have been based on that theory.

B. EVEN IF THERE WAS NO EXHAUSTION OF ADMINISTRATION REMEDIES, IT WAS UNNECESSARY BECAUSE SUCH ACTION WAS FUTILE.

The Florida Supreme Court did make the following ruling:

> 7. The Water Resources Act now controls the use of water and replaces the ad hoc judicial determination in water management districts where consuptive use permitting it is in force.

8. Jupiter's remedy is only through proper application for a permit under the Florida Water Resources Act. (371 So.2d at 672) (App. 25)

The Water Resources Act, Chapter 373, Florida Statutes, did not change the concept under Florida law that the right to the use of underlying groundwater is a property right belonging to the overlying landowner. The Chapter merely establishes regulatory power to conserve, protect, and control the water of the state. The statute is comparable to laws permitting a city or county to regulate construction through the issuance of building permits. The act simply requires a permit that may impose reasonable conditions on the use of property that already belongs to the landowner.

The Petitioner recognizes that the State of Florida may impose reasonable regulation on its use of the groundwater underlying its land; however, compensation must still be provided when water rights are taken for a public purpose.

In this instance it would be futile to apply for a permit under Chapter 373 procedures because there is no water left in the shallow water aquifer for the Petitioner to use. Respondent has caused the physical removal of the fresh groundwater and its replacement with salt water. Even if a permit had been granted under Chapter 373, it would have done the Petitioner no good. The water was unusable.

It is a well established principle of Florida law that if exhaustion of administrative remedies is *futile*, it will not preclude action in the courts. *City of Holly Hill v. State ex rel Gem Enterprises, Inc.*, 132 So.2d 29 (Fla. 1st DCA 1961); *Cook v. Di Domenico*, 135 So.2d 245 (Fla. 3d DCA 1961); *Mayflower Property, Inc. v. Ft. Lauderdale*, 137 So.2d 849 (Fla. 2d DCA 1962); *City of Miami Beach v. Jonathon Corp.*, 238 So.2d 516 (Fla. 3d DCA 1970); and *Chatlos v. Overstreet* 121 So.2d 1 (Fla. 1960).

In *Chatlos*, the Florida Supreme Court specifically held that:

> A concomitant part of the doctrine of administrative remedies . . . is that a party will not be required to take vain and useless steps in the expenditure of the administrative remedy in order to perfect the right to seek judicial redress. Id. at p 3.

Even if the Florida Supreme Court decision were based on exhaustion of administrative remedies, the doctrine of futility would apply.

Finding that the Florida Supreme Court did not resolve the issues in this case on the basis of any adequate and independent state grounds, this Court should consider the federal constitutional issues presented by this petition.

CONCLUSION

The constitutional questions raised by this petition are of immediate and critical importance to all property owners in the State of Florida.

The actions of Tequesta in causing salt water intrusion in the shallow water aquifer constitutes a taking of Petitioner's property rights under the Florida and federal constitutions without just compensation.

The Florida Supreme Court's decision retroactively declared that the Petitioner's property interest, which existed under state law prior to this decision, never existed at all. This change in state law constitutes a violation of procedural due process. The Petitioner and all other Florida property owners are entitled to have their reasonable expectations based on what had been consistent state property and water law upheld.

This Court should grant this petition in order to settle these constitutional issues and the state of Florida property and water law.

Respectfully submitted,

Fred P. Bosselman
Ross, Hardies, O'Keefe,
Babcock & Parsons
One IBM Plaza — Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Petitioner

Marjorie Diane Gadarian
Jones, Paine and Foster, P.A.
601 Flagler Drive Court
Post Office Drawer E
West Palm Beach, Florida 33402
(305) 659-3000
Counsel for Petitioner

Joel F. Bonder
Ross, Hardies, O'Keefe,
Babcock & Parsons
Chicago, Illinois 60611

Margaret L. Cooper
Jones, Paine and Foster, P.A.
West Palm Beach, Florida 33402

September, 1979

APPENDIX

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION.
CASE NO. 74 2912 CA (L) 01 G

JUPITER INLET CORPORATION, etc., *Plaintiff*
vs.
THE VILLAGE OF TEQUESTA, etc., *Defendent*

ORDER ON MOTION FOR SUMMARY JUDGMENT

This matter is presented upon a Motion for Summary Judgment filed by the Village of Tequesta. Looking at the evidence most favorable to the plaintiff, it does show a taking of his shallow water aquifer, but only *damage* to his water supply or system as a whole. Under these circumstances, condemnation proceedings are inappropriate. It is thereupon

ORDERED that the defendant's Motion for Summary Judgment is granted.

DONE AND ORDERED this 12th day of December, 1975 at Palm Beach County, West Palm Beach, Florida.

LEWIS KAPNER, Circuit Judge

Copies furnished to: Paul C. Wolfe, Equire
John Randolph, Esquire

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 74 2912 CA (L) 01 G

JUPITER INLET CORPORATION, etc., *Plaintiff*
vs.
THE VILLAGE OF TEQUESTA, etc., *Defendent*

PETITION FOR REHEARING

COMES NOW, the Plaintiff, by and through its undersigned attorneys and moves the Court for a rehearing on Defendant's Motion for Summary Judgment and for grounds therefor would refer to the brief filed in support of his Motion.

DATED this 22nd day of December, 1975.

I HEREBY CERTIFY that a copy of the foregoing has been furnished JOHN RANDOLPH, ESQ., Attorney for Defendant, Johnston, Sasser and Randolph, 1115 Harvey Building, West Palm Beach, Florida 33401, by mail, this 22nd day of December, 1975.

JONES, PAINE & FOSTER, P.A.
Attorneys for Plaintiff
P. O. Drawer E
West Palm Beach, Florida

By _____
Paul C. Wolfe

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 74 2912 CA (L) 01 G

JUPITER INLET CORPORATION, etc., *Plaintiff*
vs.
THE VILLAGE OF TEQUESTA, etc., *Defendent*

FINAL JUDGMENT

THIS CAUSE coming upon motion for final judgment based upon the order the court previously entered on December 12, 1975, and the court being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that final judgment is hereby entered in favor of the defendant and against the plaintiff, each party to bear its own costs.

DATED this 8th day of April, 1976.

_____
Circuit Judge

JUPITER INLET CORPORATION a Florida Corporation, Appellant,
v.
The VILLAGE OF TEQUESTA, a Florida Municipal Corporation, and Thomas J. Little, William E. Leone, William J. Taylor, Dorothy M. Campbell and Almeda A. Jones, Town Councilmen of the Village of Tequesta, Appellees.
No. 76-783
District Court of Appeal of Florida,
Fourth District.
Aug. 9, 1977

Condominium corporation brought inverse condemnation action against village alleging that village had taken water for public purpose from shallow aquifer underneath corporation's land and to the extent had deprived corporation of beneficial use of shallow aquifer. The Circuit Court, Palm Beach County, Lewis Kapner, J., granted summary judgment in favor of the village, and the corporation appealed. The District Court of Appeal, Green, Oliver L., Associate Judge, held that: (1) shallow aquifer beneath surface of land owned by corporation was *form of private property* and beneficial use of such aquifer by corporation could not be *divested by government for public purpose without due process of law* and *payment of compensation*, regardless of whether agents of government actually physically entered upon owner's property in order to take water from aquifer or whether they drew off water from beneath owner's land by pumping, and (2) complaint filed by condominium corporation against village, alleging that condominium corporation was deprived of beneficial use of aquifer by village's action in pumping nearby well field for public purpose stated cause of action for inverse condemnation.

Reversed and remanded.

1. Eminent Domain — 13, 122

Right of a governmental entity to take private property is limited to taking for public purpose and with full compensation to owner. West's F.S.A. Const. art. 10, § 6(a)

2. Eminent Domain — 266

When governmental entity takes private property for public purpose without formal exercise of power of eminent domain, aggrieved property owner has cause of action for inverse condemnation.

3. Eminent Domain — 2(1), 270

When something is removed from its owner's property by a governmental agency and put to public use, it has been taken; therefore, owner has been deprived by government action of use and enjoyment of what was his, and through suit for inverse condemnation owner can compel government to pay for what it has taken.

4. Constitutional Law — 277(1)
Eminent Domain — 84

Shallow aquifer beneath surface of land owned by condominium corporation was form of private property, and beneficial use of such aquifer by corporation could not be divested by government for public purpose without due process of law and payment of full compensation, regardless of whether agents of government actually physically entered upon owner's property in order to take water from aquifer or whether they drew off water from beneath owner's land by pumping. West's F.S.A. Const. art. 10, § 6(a).

5. Eminent Domain — 293(1)

Complaint filed by condominium corporation against village alleging that corporation was deprived of beneficial use of aquifer underneath its land by village's action in pumping nearby well field for public purpose stated cause of action for inverse condemnation.

Paul C. Wolf and Marjorie D. Gadarian of Jones, Paine &

Foster, West Palm Beach, for appellant.

John C. Randolph of Johnston, Sasser & Randolph, West Palm Beach, for appellees.

GREEN, OLIVER L., Associate Judge.

This is an appeal from a summary final judgment in favor of appellee, The Village of Tequesta. In granting the summary judgment the trial court stated that it was considering any factual conflicts in the light most favorable to the appellant, Jupiter Inlet Corporation. So the summary judgment, in effect, was a determination by the trail court that Jupiter Inlet's complaint failed to state a cause of action.

The legal issue is whether a municipality may be held responsible to an owner when he takes water for a public purpose from the shallow aquifer underneath the owner's land, to the extent that it deprives the owner of the beneficial use of the shallow aquifer. We hold that in such a case a municipality may be held responsible through inverse condemnation, and further that the plaintiff in this case has alleged sufficient facts to state a cause of action.

Viewing the facts in the same light as did the trial court, it appears that appellant Jupiter is the owner of certain land upon which it built condominium apartments. Tequesta owns and operates a well field in close proximity to Jupiter's property. Pumping by Tequesta from the well field has depleted the fresh water in the shallow aquifer in the vicinity of the wells and also underneath Jupiter's land. The withdrawal of fresh water by Tequesta caused a salt water intrusion into the shallow water aquifer under Jupiter's land, making it unfit for use as a water source. Jupiter had intended to use its shallow aquifer as a source of patable water for its condominium apartments. Because of the loss of its shallow water aquifer, Jupiter is required to obtain its water at a much greater expense from the deeper Floridan aquifer. The water taken by Tequesta was used by the municipality for a public purpose.

[1, 2] The right of a governmental entity to take private property is limited.

No private property may be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner. Article I. Section 6(a), Florida Constitution.

When a governmental entity takes private property for public purpose without the formal exercise of the power of eminent domain, the aggrieved property owner has a cause of action for inverse condemnation. *City of Jacksonville v. Schumann,* 167 So.2d 95 (Fla. 1st DCA 1964).

[3] Because there is no constitutional requirement that the government pay for *damage* done to private property, as opposed to *taking* private property, much hinges on how the word "take" is interpreted. Florida courts have not, over the years, been in consistent agreement on this matter, particularly where — as in the case — there was no actual entry by the governmental authority on the owners land. It seems apparent, however, that when something is removed from its owner's property by the governmental agency and put to a public use, it has been taken. The owner has been deprived by government action of the use and enjoyment of what was his, and so through a suit in inverse condemnation he can compel the government to pay for what it has taken. Compare: *State Road Department of Florida v. Tharp,* 146 Fla. 745, 1 So.2d 868 (1941): *White v. Pinellas County,* 185 So.2d 468 (Fla. 1966).

[4] The shallow aquifer beneath the surface of land is a form of private property, the beneficial use of which the owner of the land cannot be divested by the government for a public purpose without due process of law and the payment of full compensation. See *Valls v. Arnold Industries, Inc.* 328 So.2d 471 (Fla. 2d DCA 1976). That is true whether agents of the government actually physically enter upon the owner's property in order to take the water from the aquifer or whether they draw off the water from beneath the owner's land by

pumping. In either event, the owner has been deprived of the beneficial use of his property by government action for a public purpose.

[5] We conclude that the trial court should not have granted summary judgment and that Jupiter has alleged sufficient facts to state a cause of action for inverse condemnation.

Pursuant to Article V, Section 3(b)(3) of the Florida Constitution we hereby certify to the Supreme Court as a matter of great public interest, the following question:

> Can a municipality be held responsible through inverse condemnation for a taking, from private ownership for public purposes, of underground shallow aquifer water, to the extent that the owner is deprived of the beneficial use of the aquifer.

REVERSED and REMANDED for further proceedings consistent with this opinion.

ALDERMAN, C. J., and DOWNEY, J., concur.

The VILLAGE OF TEQUESTA, etc., et al., Petitioners,

v.

JUPITER INLET CORPORATION, etc., Respondent.

No. 52223.

Supreme Court of Florida

May 3, 1979.

Rehearing Denied June 26, 1979.

ADKINS, Justice

Pursuant to article V, section 3(b)(3), Florida Constitution, the Fourth District Court of Appeal in *Jupiter Inlet Corp. v. Village of Tequesta*, 349 So.2d 216 (Fla. 4th DCA 1977) certified to this Court as a matter of great public interest the following question:

> Can a municipality be held responsible through inverse condemnation for a taking, from private ownership for public purposes, of underground shallow aquifer water, to the extent that the owner is deprived of the beneficial use of the aquifer?

Jupiter Inlet Corporation, plaintiff in the trial court, will be referred to as Jupiter, and The Village of Tequesta, defendant in the trial court, will be referred to as Tequesta.

Jupiter owned property near Tequesta on which it planned to build a 120-unit condominium project. "Broadview." This property was located approximately 1200 feet from Tequesta's well field number four. This well field contained seven wells, seventy-five to ninety feet deep, which pumped in excess of a million gallons of water a day from the shallow water aquifer to supply Tequesta residents with water. It was relatively inexpensive to withdraw water from the shallow-water aquifer.

As a result of the excessive amount of water withdrawn by Tequesta from the shallow-water aquifer, the fresh-water supply was endangered and salt-water from the intercoastal

waterway intruded into the shallow-water aquifer. There was testimony from a hydrologist that salt-water intrusion was caused by a reduction in the water levels in the interior to a point low enough that the fresh-water level could not withstand the pressure of the salt-water level in the intercoastal. The water which Tequesta withdrew came from the shallow-water aquifer beneath its property. Because Tequesta would not supply Jupiter water, it was necessary for Jupiter to secure a special exception from the country. Tequesta, opposed the permit application and it was denied. Jupiter was not permitted to drill wells to withdraw water from the shallow water aquifer because of the endangered condition of the aquifer due to the excessive withdrawals made by Tequesta.

The only means by which Jupiter could supply water to its property was to drill a well to the Floridan aquifer located 1200 feet below the surface, at a substantially greater cost.

Jupiter instituted an action for inverse condemnation and injunction due to the excessive pumping by Tequesta. The theory of Jupiter's action was that due to depletion by Tequesta of the shallow-water aquifer beneath its property Jupiter was effectively deprived of the beneficial use of its property rights in the shallow-water aquifer.

Considering any factual conflicts in the light most favorable to Jupiter, the trial judge granted a summary judgment in favor of the Village of Tequesta. Viewing the facts in the same light as did the trial court, the district court of appeal said:

> The owner has been deprived by government action of the use and enjoyment of what was his, and so through a suit in inverse condemnation he can compel the government to pay for what it has taken.

349 So.2d at 217. The district court of appeal then certified the above question to this Court for consideration.

The following hydrological statements are fully supported by F. Maloney, S. Plager, and F. Baldwin, *Water Law and Administration*, page 141 (1968) (hereinafter referred to as *Water Law*) as well as the discussion in *City of St. Petersburg v. Southwest Florida Water Management District*, 355 So.2d 796 (Fla. 2d DCA 1977).

Water-bearing zones under the earth's surface capable of receiving, storing, and transmitting water are called aquifers. Most aquifers in Florida are cavernous limestone or sand and shale beds. Aquifers are separated by relatively impervious layers of shales and clays which are called aquicludes.

There are two basic types of acquifers. One is the unconfined aquifer associated with the water table. It is free to rise and fall with the amount of rainfall and other surface-water influences such as rivers, lakes, irrigation, etc. Near the coast the water level in this aquifer fluctuates with the tidal action. It is referred to as the ground-water aquifer, water-table aquifer, and the shallow aquifer.

The other type of aquifer is an artesian aquifer. Water in this aquifer is confined within aquicludes. Water will either not pass through these aquicludes or will do so at a much slower rate than it can travel within the aquifer itself. Water enters artesian aquifers slowly through the surrounding aquiclude by virtue of fissures, sinkholes, or other openings in the aquiclude. Water in the artesian aquifer is under pressure. One artesian aquifer is known as the Floridan aquifer. It underlies most of the state and furnishes most of the well-water supplies of the state.

In an early decision, *Tampa Watchworks Co. v. Cline*, 37 Fla. 586, 20 So 780 (1896), we made a classification of water passing over or through lands as follows:

> (1) In respect to surface streams which flow in a permanent, distinct, and well-defined channel from the lands of one owner to those of another; (2) in respect to surface waters, however originating, which, without any distinct or well-defined channel, by attraction, gravitation or otherwise, are shed and pass from the lands of one proprietor to those of another; (3) subterranean streams

which flow in a permanent, distinct, and well-defined channel from the lands of one to those of another proprietor; (4) subsurface waters which, without any permanent, distinct, or definite channel, percolate in veins or filter from the lands of one owner to those of another. 20 So. at 782.

Although we classified water as if its different physical states were separate and distinct, we recognize that these classes are interrelated parts of the hydrologic cycle. We are primarily concerned in this case with the rights of landowners in the shallow-water aquifier.

[1] Ancient law gave no special consideration to ground water, treating all water like the air, the sea, and wild animals, as the property of no one or the property of everyone. Trelease, *Government Ownership and Trusteeship of Water,* 45 Calif. Law Review 638, 640 (1957). Technological ignorance about the existence, origin, movement and course of percolating ground waters resulted in the so-called "English rule" which essentially allowed a land owner to take or interfere with percolating waters underlying his land, irrespective of any effects his use might have on ground water underlying his neighbors' lands. This doctrine, first enunciated in 1843 in an English case, *Acton v. Blundell,* 152 Eng. Rep. 1235 (1843) was based upon the maxim, "To whomsoever the soil belongs, he owns also the sky and to the depths." *See Water Law* at 155. With the growth of hydrological capabilities in pumping technology, the English rule was repudiated in most American jurisdictions. *See* Annots. 29 A.L.R.2d 1354, 1361-65 (1953); 109 A.L.R. 395, 399-403 (1937); 55 A.L.R. 1385, 1398-1408 (1928), and cases cited therein. The so-called "American," or "reasonable use," rule rejected the "to the sky and to the depths" notion for another maxim, "use your own property so as not to injure that of another." *See Koch v. Wick,* 87 So.2d 47 (Fla. 1956); *Cason v. Florida Power Co.,* 74 Fla. 1, 76 So. 535 (Fla. 1917); *Bassett v. Salisbury Manufacturing Co.,* 43 N.H. 569 (1862). The

reasonable use rule adopted by most Eastern states, including Florida, was stated by one court as follows:

> [A] landowner, who, in the course of using his own land, obstructs, diverts, or removes percolating water to the injury of his neighbor . . . must be [making] a reasonable exercise of his proprietary right i. e., such an exercise as may be reasonably necessary for some useful or beneficial purpose, generally relating to the land in which the waters are found.

Finley et ux. v. Teeter Stone, Inc., 251 Md 428, 435, 248 A.2d 106, 111-12 (Md.App. 1968). *See also Water law* at 158.

In applying the reasonable use rule this Court has not given definite answers as to the actual amount of water that may be taken by overlying land owners, nor have we considered the meaning of the term "ownership" as applied to percolating water.

In 93 C.J.S. *Waters* section 90, page 765 (196), the rule is stated thus:

> There can be no ownerhsip in seeping and percolating waters in the absolute sense, because their wandering and migratory character, unless and until they are reduced to the actual possession and control of the person claiming them. Their ownership consists in the right of the owner of the land to capture, control, and possess them, to prevent their escape, if he can do so, from his land, and to prevent strangers from trespassing on this land in an effort to capture, control or possess them. If percolating waters escape naturally to other lands, the title of the former owner is gone; while a landowner may prevent the escape of such waters from this land, if he can do so, yet he has no right to follow them into the lands of another and there capture, control, or reduce them to possession. [Footnotes omited].

[2] The common-law concept of absolute ownership of percolating water while it is in one's land gave him the right to abstract from his land all the water he could find there. On

the other hand, it afforded him no protection against the acts of his neighbors who, by pumping on their own land, managed to draw out of his land all the water it contained. Thus the term "ownership" as applied to percolating water never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself.

[3] This necessarily follows from the physical characteristic of percolating water. It is migratory in nature and is a part of the land only so long as it is in it. There is a right of use as it passes, but there is no ownership in the absolute sense. It belongs to the overlying owner in a limited sense, that is, he has the unqualified right to capture and control it in a reasonable way with an immunity from liability to his neighbors for doing so. When it is reduced to his possession and control, it ceases to be percolating water and becomes his personal property. But if it flows or percolates from his land, he loses all right and interest in it the instant it passes beyond the boundaries of his property, and when it enters the land of his neighbor it belongs to him in the same limited way.

[4] The right of the owner to ground water underlying his land is to the usufruct of the water and not to the water itself. The ownership of the land does not carry with it any ownership of vested rights to underlying ground water not actually diverted and applied to beneficial use.

In *Valls v. Arnold Industries, Inc., et al.*, 328 So.2d 471, 473 (Fla. 2d DCA 1976) the court said:

> Water, oil, minerals, and other substances of value which lie beneath the surface are valuable property rights which cannot be divested without due process of law and the payment of just compensation.

This case involved a post-trial apportionment award in condemnation as between fee-title owners and owners of reserved mineral rights. In order to effect a payment to the holders of the mineral rights, it was necessary for the court to find that these mineral rights were property rights and therefore subject to condemnation. The court relied upon *Copello v. Hart*,

293 So.2d 734 (Fla. 1st DCA 1974) and *Dickinson et al. v. Davis et al.*, 224 So.2d 262 (Fla. 1969). These cases held that minerals, gas, and oil are separate properties from the surface and may be conveyed and taxed separately. Neither case referred to property rights in water.

[5] We overrule the dicta in *Valls, supra*, that water beneath the surface is a private property right which cannot be divested under any circumstances without due process of law and the payment of just compensation. The right to use water does not carry with it ownership of the water lying under the land. Of course, "property" in its strict legal sense "means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects." *Tatum Brothers, etc. v. Watson*, 92 Fla. 278, 109 So. 623, 626 (1926). This "right of user" may be protected by injunction, *Koch v. Wick, supra* or regulated by law, *Pounds v. Darling*, 75 Fla. 125, 77 So. 666 (1918); *Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909), but the right of user is not considered "private property" requiring condemnation proceedings unless the property has been rendered useless for certain purposes. For example, in *Kendry et al. v. State Road Department*, 213 So.2d 23 (Fla. 4th DCA 1968), the state agency caused such flooding on the owner's property that it was rendered useless for residential purposes. this was a "taking."

In the case *sub judice*, Jupiter was only subjected to the consequential damages incurred when it was required to draw water from the Floridan aquifer instead of the shallow-water aquifer. It still had a "right of user."

There is a distinction when this right of user as to water has been invaded by circumstances showing an intentional invasion in an unreasonable manner or an unintentional invasion when the conduct was negligent, reckless, or ultrahazardous, resulting in a destruction of the right of user as to land.

For example, in *Labruzzo et ux. v. Atlantic Dredging & Const. Co. etc.*, 54 So.2d 673 (Fla. 1951), plaintiff sued for

damages for interruption and diversion of the natural flow of the underground waters which fed plaintiff's spring. The defendant contended that there was no indication of the existence of a well-defined subterranean stream feeding plaintiff's spring. Therefore, the source of the spring should have been considered percolating waters, the flow of which had been interrupted by the defendant in the lawful and reasonable use of its property. Under the reasonable use rule, defendant contended that plaintiff had no cause of action. The trial judge agreed and, upon appeal, this Court reversed, saying:

> At the outset, it should be noted that we are not here dealing with a problem involving a proprietary competition over the water itself — that is to say, there is no conflict here between the respective rights of persons to make competing proprietary uses of subterraenan waters to which they both have access. In such cases, the present trend among the courts of the country is away from the old common-law rule of unqualified and absolute right of a landowner to intercept and draw from his land the percolating waters therein; and the latter cases hold that the right of a landowner to subterranean waters percolating through his own land and his neighbor's lands is limited to a reasonable and beneficial use of such waters . . .
>
> In the instant case, however, we are concerned with an interference with plaintiffs' use of the spring on their land, caused by conduct of the defendant not involving a competing use of water and in which the effect on the subterranean water is only incidental to the defendant's use of its land. Obviously, then, the rule of "reasonable use," as engrafted upon the old common-law rule of absolute and unqualified ownership of percolating waters, insofar as the proprietary beneficial use of the *water* is concerned, has no application here where we are concerned with the proprietary use of the *land*, and in which the water is only incidentally affected. Under such circumstances, even at common law, a person was subject to liability for interference with another's use of water, either for (1) an intentional invasion when his conduct was unreasonable under the circumstances of the particular case, or (2) an unintentional invasion when his conduct was negligent, reckless or ultrahazardous. Restatement of Torts, Vol. IV, Section 849, and Sections 822-840. In the absence, then, of surface indications, an interference with subterranean water is, or course, unintentional and *damnum absque injuria* unless the conduct resulting therein is negligent, reckless or ultrahazardous . . . Since the allegations of plaintiffs' declaration must be taken as true on demurrer, it is clear that plantiffs have stated a cause of action for an intentional invasion by defendant of their water rights, for which it must respond in damages if it conduct was unreasonable under the particular circumstances . . . [Citations omitted]. 54 So.2d at 675-77

Article X, section 6, of the Florida Constitution forbids the "taking" of private property except for a public purpose and with full compensation. Unlike the constitutions of several other states, the Florida Constitution does not expressly forbid "damage" to property with just compensation. *Arundel Corp. et al. v. Griffin et al.*, 89 Fla. 128, 103 So. 422 (1925).

[6] When the governmental action is such that it does not encroach on private property but merely impairs its use by the owner, the action does not constitute a "taking" but is merely consequential damage and the owner is not entitled to compensation. *Selden et al. v. City of Jacksonville,* 28 Fla. 558. 10 So. 457 (1891).

In *Poe v. State Road Department,* 127 So.2d 898, 901 (Fla. 1st DCA 1961) the court said:

> It is universally recognized that injury by the condemnor to remaining land caused by obstructing, diverting or increasing the flow of surface waters, but which do not amount to a permanent deprivation by the owner of

the use of such remaining lands, is a consequential damage resulting from the taking in an eminent domain proceeding, and must be recovered in that proceeding, if at all. [Footnote omitted].

[7] If the damage suffered by the owner is the equivalent "of a taking" or an appropriation of his property for public use, then our constitution recognizes the owner's right to compel compensation. On the other hand, if the damage suffered is not a taking or an appropriate within the limits of our organic law, then the damages suffered are *damnum absque injuria* and compensation therefor by the public agency cannot be compelled. *Weir v. Palm Beach County,* 85 So.2d 865 (Fla. 1956)

The district court of appeal, in its opinion, relied upon *White v. Pinellas County,* 185 So.2d 468 (Fla. 1966), as authority for the principle that a taking can occur when any property rights are involved. This case involved trees and shrubs located on the property which were used as a windbreak and a privacy screen. In *White* there was a physical invasion of the property when the state, through its agents, cut down large trees and shrubs. In the case *sub judice* there was no physical invasion of Jupiter's property by the agents of Tequesta, so no compensation is due for consequential damage.

The cases relied upon by respondent involve situations where there was damage to the land itself, a result which does not exist in this case. *Cason v. Florida Power Co., supra,* dealt with resulting damage to the fee because of the diversion of percolating water. *Koch v. Wick, supra,* dealt with damage to the fee by diversion of water therefrom to the point that the fee would become infertile and unsuitable for cultivation. In *State Road Department et al. v. Tharp,* 146 Fla. 745, 1 So.2d 868 (1941), the construction of a highway embankment impeded the flow and raised the level of a millrace to such an extent as to destroy the use of plaintiff's grist mill. This was held to be a taking.

[8] The "reasonable use" rule insofar as the proprietary beneficial use of water is concerned has no application where the court is concerned with the proprietary use of *land,* and in which the water is only incidentally affected. *See Labruzzo v. Atlantic Dredging and Construction Co., supra.*

Property owners have been successful in seeking relief under the theory of inverse condemnation against the appropriate authority as a result of the excessive noise from low-flying jet aircraft. *See Hillsborough County Aviation Authority v. Benitez,* 200 So.2d 194 (Fla. 2d DCA 1967). The "taking" of an airspace above the land is not comparable to the "taking" of the water located in a ground aquifer beneath the land in the absence of a trespass on the land itself. The damage to the airspace was such as to deprive the property owners of all beneficial use of their property. The alleged damage to the shallow-water aquifer deprived Jupiter of no beneficial use of the land itself. Jupiter developed the property to its highest and best use and has suffered no more than consequential damage, which is not compensable through inverse condemnation.

[9] The bare essential facts controlling this case are simple and direct. Tequesta utilized all of the available percolating water of the shallow-well aquifer in the area of Jupiter's land. Jupiter decided to become a competing user. This desire was thwarted because Tequesta had utilized all of the water which could be safely withdrawn from the shallow-well aquifer. This meant Jupiter had to go deeper to the Floridan aquifer to obtain its water and to spend more money than it would have if allowed to use the shallow-well aquifer. The costs were increased both in drilling and treatment of the water. It is a hydrologic impossibility to place a value upon the water which was withdrawn from underneath Jupiter's land.

It is incumbent upon Jupiter to show, not only a taking, but also that a private property right has been destroyed by governmental action. Jupiter did not have a constitutionally protected right in the water beneath its property. In the

cases cited by Jupiter, the courts supported compensation for the taking of a use which was existent and of which a party was deprived . Jupiter seeks to be compensated for a use which it had never perfected to the point that it was in existence. Jupiter had a right to use the water, but the use itself is not existent until this right is exercised.

The property rights relative to waters that naturally percolate through the land of one owner to and through the land of another are correlative. Reasonableness could only be determined after the conflict arises between users. The "reasonableness" of a given use depends upon many variables such as: the reasonable demands of other users; the quantity of water available for use; the consideration of public policy. Even an allocation between conflicting users has no durability, for the decision by another land owner to exercise his previously neglected right to use water could easily render all other uses unreasonable. A person developing his own land could make a substantial investment with no way of determining whether reasonable use by others would limit or destroy his development right even though it was the first in time.

[10] The judicial system was ill-equipped to deal with such conflict and became oriented to a case-by-case approach to solving disputes. This Court recognizes that all conflicts between competing users must be determined from the facts and circumstances of particular cases as they arise. *Cason v. Florida Power Co., supra.* This "right to use" is not "private property" as contemplated by article X, section 6, Florida Constitution requiring full compensation before taking for a public purpose.

[11] The State of Florida operates under an administrative system of water management pursuant to the terms of the Florida Water Resources Act. Ch. 373, Fla.Stat. (1972). The law prior to the Florida Water Resources Act did not allow ownership in the corpus of the water, but only in the use of it. Even then, the use was bounded by the perimeters of reasonable and beneficial use. Legislation limiting the right to the

use of the water is in itself no more objectionable than legislation forbidding the use of property for certain purposes by zoning regulations. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 47 S.Ct. 114, 71 L.Ed. 303 (1926); 54 A.L.R. 1016 (1928).

[12] The Florida Water Resources Act, in recognizing the need for conservation and control of the waters in the state (Section 373.016, Fla.Stat. (1973)) makes all waters in the state subject to regulation, unless otherwise specifically exempt. § 373.023(1) Fla.Stat. (1973). The Department of Environmental Regulation and the various water management districts are given the responsibility to accomplish the conservation, protection, management, and control of the waters of the state. § 373.016(3) Fla.Stat. (1973). In order to exercise such controls a permitting system is established which requires permits for consumptive use of water, exempting only "domestic consumption of water by individual users" from the requirements of a permit. § 373.219(1) Fla.Stat. (1973). Jupiter, in serving a 120-unit condominium, does not qualify as an individual user and thus must secure a permit in order to draw water from beneath its property. Without a permit Jupiter has no such property right to the use of water beneath its land for which, upon deprivation, it must be compensated through inverse condemnation.

[13] The Water Resources Act of 1972 recognizes a right to use water under the common law as separate from the right to use water under a permit granted pursuant to the act. This is done by a provision concerning the termination of the common-law right and a transitional procedure. The holder of such a common-law water-use right was given two years to convert the common-law water right into a permit water right. § 373.226(3) Fla.Stat. (1973). In order to qualify for the initial permit under section 373.226(2) Florida Statutes (1973), the right must have been exercised prior to the implementation fo the Florida Water Resources Act by a water management district with geographical jurisdiction in that area. Otherwise the right is abandoned and extinguished

requiring a new application for a permit. Tequesta had acquired the permit and Jupiter was merely a proposed user. The Florida Water Resources Act makes no provision for the continuation of an *unexercised* common-law right to use water. Jupiter had perfected no legal interest to the use of the water beneath its land which would support an action in inverse condemnation.

Section 373.1961 Florida Statutes (1975) provides additional powers and duties for the governing boards of the water management district. Subsection (7) provides that the governing board:

> May acquire title to such interest as is necessary in real property, by purchase, gift, devise, lease, eminent, domain, or otherwise, *for water production and transmission* consistent with this section. However, the district shall not use any of the eminent domain powers herein granted to acquire water and water rights already devoted to reasonable and beneficial use or any water production or transmission facilities owned by any county, municipality, or regional water supply authority. [Emphasis supplies.]

[14] Condemnation of "water rights" is not granted in the first sentence of this subsection. The authority granted is specifically limited to the acquisition of land for the purpose of constructing and operating well fields and other withdrawals facilities and for the right-of-way necessary for the transmission of water to consumers. The second sentence prohibits the use of eminent domain to acquire such "water rights" which were *already* being put to a reasonable and beneficial use. The statutory prohibition of the use of eminent domain in one situation cannot be used as authority for its use by implication in another, as the statute must be strictly construed. *Canal Authority v. Miller,* 243 So.2d 193 (Fla. 1970). All that Section 373.1961(7) Florida Statutes (1975) accomplishes is to further protect presently existing legal uses of water. No implication can be drawn that this section intends to include any "water right" other than the permit

that may be granted by a water management district. After all, if a use of water is both preexisting and also reasonable and beneficial, after two years, it must be either under permit or it is conclusively presumed to be abandoned. There was no necessity for the Water Resources Act to provide for the condemnation of an unexercised right to use water, as the owner became subject to the permit provisions of the law. There was no "taking" of this right.

In summary, we hold:

1. Prior to the adoption of the Water Resources Act, Florida followed the reasonable use rule; that is, a landowner, who, in the course of using his own land, removes percolating water to the injury of his neighbor, must be making a reasonable exercise of his proprietary rights, *i. e.,* such an exercise as may be reasonably necessary for some useful or beneficial purpose generally relating to the land in which the waters are found;

2. There was no ownership in the waters below the land, as the right of the owner to ground water underlying his land was to the use of the water and not to the water itself;

3. In applying the reasonable use rule, this Court has not given definite answers as to the actual amount of water that may be taken by overlying landowners.

4. The diversion of water from the shallow-water aquifer is not a "taking" or an appropriation of property for public use requiring condemnation proceeding unless there is a resulting damage to the land itself, for example, a diversion of water to the extent that the land becomes unsuitable for cultivation, raising the level of flowing waters to the extent that land is flooded, etc.;

5. The landowner does not have a constitutionally-protected property right in the water beneath the property, requiring compensation for the taking of the water when used for a public purpose;

6. Just as legislation may limit the use of property for certain purposes by zoning, so it is that the right to the use of the water may also be limited or regulated.

7. The Water Resources Act now controls the use of water and replaces the ad hoc judicial determination in water management districts where consumptive use permitting is in force.

8. Jupiter's remedy is only through proper application for a permit under the Florida Water Resources Act.

For the above reasons, we answer the certified question in the negative and hold that Tequesta cannot be held responsible for damages through inverse condemnation.

The decision of the district court of appeal is quashed and this case is remanded with instructions to affirm the summary judgment entered by the trial judge in favor of Tequesta.

ENGLAND, C. J., and BOYD, OVERTON AND SUNDBERG, J.J., concur.

SUPREME COURT OF FLORIDA

Case No. 52,223

THE VILLAGE OF TEQUESTA, etc., et al., *Petitioners,*

vs.

JUPITER INLET CORPORATION, etc., *Respondent.*

PETITION FOR REHEARING

Respondent, Jupiter Inlet Corporation, pursuant to Rule 9:330, F.A.R., hereby moves this Honorable Court for a rehearing or reversal of its decision filed May 3, 1979, and as grounds therefore would show:

1. This Court states at page 7 of its decision that Jupiter Inlet Corporation incurred only consequential damages when it was required to withdraw water from the Floridan acquifer instead of the shallow water acquifer and that Jupiter Inlet Corporation still had a "right to user". This Court overlooks the fact that the only right to use Jupiter Inlet Corporation had remaining was a right to use the deeper Floridan acquifer. Its right to use the shallow water acquifer was taken when Tequesta withdrew so much water as to render the shallow water acquifer useless.

2. This Court overlooked or failed to consider amendment V to the United States Constitution which provides that ". . . No person shall be deprived of property without due process of law . . . nor shall private property be taken for public use, without just compensation." Tequesta's actions amount to a taking of Jupiter Inlet Corporation's right to use of the shallow water acquifer for public use without payment of just compensation.

3. This Court overlooked or failed to consider *Adams v. County of Dade,* 225 So.2d 594 (Fla. 3rd DCA 1976) which shows that actual physical entry onto the land is not required.

4. This Court states at page 10 of its decision that "It is a hydrologic impossiblity to place a value upon the water which

was withdrawn from underneath Jupiter's land". There is nothing in the record which supports this statement.

5. This Court overlooked or failed to consider the fact that Jupiter Inlet Corporation tried to "perfect" its right to use of the shallow water acquifer when it applied for a permit, but was unable to secure a permit because Tequesta had withdrawn so much water from the shallow water acquifer and taken all the water which Jupiter Inlet Corporation had a right to use.

I hereby certify that a true copy of the foregoing has been furnished by United States mail this 17th day of May, 1979, to John C. Randolph, Esq., Johnston, Sasser & Randolph, Post Office Box 48, West Palm Beach, FL 33402; Thomas J. Schwartz, Esq., Post Office Box V, West Palm Beach, FL 33402; John T. Allen, Jr., Esq., 4508 Central Avenue, St. Petersburg, FL 33711; Jacob D. Varn, Esq., Post Office Box 3239, Tampa, FL 33601; and Louis de la Parte, Jr., Esq., 725 East Kennedy Boulevard, Tampa, FL 33601.

JONES, PAINE & FOSTER, P.A.
Attorneys for Respondent
Post Office Drawer E
601 Flagler Drive Court
West Palm Beach, FL 33402
(305) 659-3000

By _____
Marjorie D. Gadarian

IN THE SUPREME COURT OF FLORIDA
TUESDAY, JUNE 26, 1979

THE VILLAGE OF TEQUESTA,
et al., *Petitioners,*
v.
JUPITER INLET CORPORATION,
etc., *Respondent.*
Case No. 52,223
District Court of Appeal,
Fourth District
76-783

Upon consideration of the Petition for Rehearing filed by attorney for Respondent and responses thereto,

IT IS ORDERED by the Court that said Petition be and the same is hereby denied.

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: _____
Deputy Clerk

TC
Hon. Clyde L. Heath, Clerk
Hon. Lewis Kapner, Judge
Hon. John B. Dunkle, Clerk
Marjorie D. Gadarian, Esquire
John C. Randolph, Esquire
Edward P. de la Parte, Jr., Esquire
Thomas J. Schwartz, Esquire
Robert Grafton, Esquire
Stephen A. Walker, Esquire
John H. Wheeler, Esquire
Jacob D. Varn, Esquire
John C. Wendel, Esquire

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL DISTRICT OF FLORIDA IN AND
FOR PALM BEACH COUNTY CIVIL ACTION

JUPITER INLET CORPORATION,
A Florida corporation,
Plaintiff
vs.
THE VILLAGE OF TEQUESTA,
a Florida municipal corporation,
and THOMAS J. LITTLE, WILLIAM E. LEONE,
WILLIAM J. TAYLOR, DOROTHY M. CAMPBELL
and ALMEDA A. JONES, Town Councilmen of
THE VILLAGE OF TEQUESTA,
Defendents

COMPLAINT FOR INVERSE CONDEMNATION AND PROHIBITORY INJUNCTION

COMES NOW the Plaintiff, JUPITER INLET CORPORATION, a Florida corporation, by and through its undersigned attorneys, and for Complaint against the Defendants, says:

COUNT I

1. This is an action for the inverse condemnation of private property located in Palm Beach County, Florida.

2. Plaintiff is a corporation duly organized and existing under the laws of the State of Florida, with its principal place of business located in Palm Beach County, Florida.

3. Defendant, THE VILLAGE OF TEQUESTA, is a municipality existing under the laws of the State of Florida, and located in Palm Beach County, Florida.

4. Defendants, THOMAS J. LITTLE, WILLIAM E. LEONE, WILLIAM J. TAYLOR, DOROTHY M. CAMPBELL, ALMEDA A. JONES, are members of and comprise the town council of THE VILLAGE OF TEQUESTA, and

are residents of Palm Beach County, Florida.

5. Plaintiff is the owner in fee simple absolute of certain real property located in Palm Beach County, Florida, more particularly described in Exhibit A, attached hereto and made a part hereof.

6. Defendants, by the intentional pumpage of ground water from their municipal well field number four (4) located in proximity to Plaintiff's above-described real property, have so drained the ground water resources of Plaintiff's above-described real property as to render said property unusable for any purpose and have thereby taken said private property.

7. Defendants, by the intentional pumpage of ground water from their municipal well field number four (4) located in proximity to Plaintiff's above-described real property, have so drained the ground water resources of Plaintiff's above-described real property as to deny Plaintiff the reasonable use and enjoyment of said ground water naturally occurring on Plaintiff's above-described property and have thereby taken said private property.

8. Defendants are presently and threaten to continue the future pumping of ground water from their well field number four (4) so as to further drain the ground water from Plaintiff's property.

9. Defendants' pumpage from the above-described well field has been used to supply residents of THE VILLAGE OF TEQUESTA and others with their domestic, commercial and industrial water use requirements.

10. Plaintiff has been deprived of the use and enjoyment of the said property without payment of full compensation by the Defendants.

11. Plaintiff says that the damages described herein are great and prays that a hearing be accorded it before a jury in order that full compensation may be fixed and determined for the loss occasioned by this taking.

12. Plaintiff says that it has been required to employ attorneys to represent it in this cause, and thus have become

obligated for a reasonable attorneys' fee, and that it will be required to incur fees and expenses for appraisers, engineers, surveyors and other expert witnesses. Further, Plaintiff will incur reasonable costs and expenses in the presentation and presentation of this case, for which Plaintiff is entitled to be reimbursed and paid by the Defendants in accordance with the Constitution of the State of Florida and Florida Statutes §73.091 (1973).

WHEREFORE, Plaintiff prays that Defendants be required to pay Plaintiff full compensation for the taking of said private property, costs, attorneys fees, costs and fees for expert witnesses, and such other and further relief as this Court may deem just and equitable.

COUNT II

1. This is an action for a prohibitory injunction.

2. Plaintiff realleges and reaffirms allegations of Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of Count I.

3. Plaintiff will suffer irreparable injury from Defendants' continued actions unless Defendants are enjoined from further pumpage from well field number four (4).

WHEREFORE, Plaintiff prays that Defendants be temporarily and permanently enjoined from pumping ground water from their municipal well field number four (4) as to deny Plaintiff its right to the reasonable use of its own ground water resources, costs, and further, that Plaintiff receive such other relief as this Court may deem just and equitable.

JONES, PAINE & FOSTER, P.A.
Attorneys for Plaintiff
P. O. Drawer E
West Palm Beach, Florida 33402
659-3000

By _____
Burton C. Smith, Jr.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL DISTRICT OF FLORIDA IN AND FOR PALM BEACH COUNTY CIVAL ACTION
CASE NO. 74 2912 CA (L) 01 KAPNER

JUPITER INLET CORPORATION,
A Florida corporation, *Plaintiff*
vs.
THE VILLAGE OF TEQUESTA, a Florida municipal corporation, et al., *Defendents*

Answer and Affirmative Defenses

Come now the defendants, THE VILLAGE OF TEQUESTA, a Florida municipal corporation, and THOMAS J. LITTLE, WILLIAM E. LEONE, WILLIAM J. TAYLOR, DOROTHY M. CAMPBELL and ALMEDA A. JONES, Town Councilmen of THE VILLAGE OF TEQUESTA, and answer the complaint filed in this casue and say:

COUNT I

1. The defendants are with knowledge of the allegations as contained in paragraphs 1 and 2 of Count I and, therefore, deny same and demand strict proof thereof.

2. The defendants admit the allegations of paragraphs 3 and 4 of Count I of the complaint.

3. The defendants are without knowledge as to the allegations contained in paragraph 5 of Count I and, therefore, deny same and demand strict proof thereof.

4. The defendants deny paragraphs 6, 7, 8, 9, 10 and 11 of Count I.

5. The defendants are without knowledge of the allegations contained in paragraph 12 of Count I and, therefore, deny same and demand strict proof thereof.

COUNT II

1. The defendants are without knowledge as to the allegations contained in paragraph 1 of Count II and, therefore, deny same and demand strict proof thereof.

2. The defendants are without knowledge of the allegations contained in paragraph 2 of Count II, and, therefore, deny same and demand strict proof thereof.

3. The defendants deny paragraph 3 and 4 of Count II.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The plaintiff should not be allowed to bring or maintain this action, either as to Count I or as to Count II, against these defendants due to the fact that the acts of the defendants that are complained of are lawful and reasonable exercises of the police power pursuant to Statutory and Constitution authority.

Second Affirmative Defense

The plaintiff should not be allowed to bring or maintain his action, either as to Count I or as to Count II, against these defendants due to the fact that the acts that are complained of as having been done by these defendants do not affect the plaintiff in a manner which is unlike that which is endured by the public generally.

JOHNSTON, SASSER & RANDOLPH

By _____

H. Adams Weaver
Attorneys for Defendants
P. O. Box 48
West Palm Beach, Florida 33401

DEPOSITION TESTIMONY OF LEONARD LINDAHL, CONSULTING ENGINEER

Q. Can you define for me in layman's terms, what salt water intrusion means?

A. Salt water intrusion means the movement of salt water into a fresh water system.

Q. Is that occurring, in your opinion, on or in the Broadview property.?

A. Oh, yes. Yes, sir, in my opinion, definitely.

Q. And have you made, or your engineering firm, on behalf of Jupiter Inlet Corporation, made any tests to determine the magnitude or volume of this salt water intrusion?

A. No, sir.

Q. Are there any studies upon which you base your opinion?

A. I base my opinion from, on data that has been supplied to me from the United States Geological Survey, which I consider to be a pretty good data base.

Q. Mr. Lindahl, what is meant by the term "area of influence" in terms of water supply?

A. It would be extremities of a cone of depression, in this particular instance, our subject matter.

Q. We had better define "cone of depression", then, if you will.

A. Cone of depression is the lowering of the water table due to an outside influence; that outside influence could be pumping, it could be some other way of removing water from the ground, or intercepting a ground water table with a fresh water body. In any event, it is the removal of ground water by some outside influence, lowering of the water table to do that.

Q. In your opinion, are the Village of Tequesta, Well Field No. 4, and the Broadview property in the same area of influence?

A. Yes, sir

Q. Do you have an opinion as to what has caused the salt water intrusion in this area of influence?

A. Yes, sir, I certainly do.

Q. What is that?

A. Based on the information supplied to me through the U.S. Geological Survey documents, which have appeared in many meetings and hearings and formal proceedings that we have had on this matter, they demonstrate a sizeable cone of depression around Well Number 4. The extent of that cone of depression varies, of course, seasonally, but it would be that cone of depression that is causing the movement of salt water into the fresh water reservior.

Q. And what causes the cone of depression?

A. In my opinion, it would be activities of Well Field Number 4."

DEPOSITION OF HARRY FRED LAND,
U.S. GEOLOGICAL SURVEY
DIRECT EXAMINATION

BY MR. SMITH:

Q. Please state your name and present residence address?

A. My name is Harry Fred Land, L-a-n-d, and my addresss in 12565 Southwest 34th Street in Miami.

Q. Mr. Land, who are you employed by?

A. The United States Geological Survey, Water and Resources Division.

Q. In what capacity?

A. I am a hydrologist working in water resources in Palm Beach County area.

Q. Okay. Has there been salt water intrusion into well field number four specifically?

A. Yes. Well field number four has had wells damned by salt water intrusion, their utility has been damned.

Q. Could you describe the nature of that salt water intrusion?

A. Nature?

Q. Where it is coming from?

A. Salt water intrusion has come from the Intercoastal Waterway in the lower portion of the aquifer.

Q. How have you determined there has been salt water intrusion in well field number four?

A. Not only from the chloride content of the supply well, Tequesta supply wells have gone up, we have also installed salinity monitoring well in the area and those wells are designed and installed with the intent of determining the position of the salt water front and then with the intent of monitoring its changes with time.

Q. Would you say that there is a certainty in your mind that there has occurred salt water intrusion in well field number four, it has come from the Intercoastal waterway?

A. Yes.

Q. Would you also state there is a certainty in your mind that this is the result of withdrawals in the area, be they withdrawals by the Village of Tequesta or other users?

A. Yes. Intrusion had to be caused by stress and that stress was withdrawal, ground water withdrawals.

Q. Could you explain to me the mechanics of salt water intrusion and if you would relate them specifically to well field number four in the Intercoastal Waterway?

A. Salt water intrusion is caused by a reduction in the water levels in the interior. When the reduction becomes low enough that it no longer can stand the pressure of, as exerted by the constant head, the constant water levels maintained by the Intercoastal Waterway, plus the density pressures that salt water generates because it is higher than fresh water, this is when salt water intrusion occurs because there is a reduction in the water level in the interior.